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Larry Gregory, Executive Director

August 16, 2019

Hon. Casey Eure
Chair Gaming Committee
Mississippi State Capitol
Room: 201M-5
Jackson, MS 39215

Via Hand Delivery

Re: *RW Development and Diamondhead Real Estate Litigation*

Dear Chairman Eure:

I am writing on behalf of the Mississippi Gaming & Hospitality Association (MGHA), a non-profit association whose members include the 26 casinos operating in the State of Mississippi. As former executive director of the Mississippi Gaming Commission, after hearing from our legal counsel about the developments in the referenced cases, I have serious concerns I would like to share with you.

We all know that in 2005 every casino operating on the Gulf Coast was destroyed or seriously damaged by Hurricane Katrina. In an effort to save the casino industry, the Legislature held a Special Session and passed what is known as HB 45 just 30 days after Katrina made landfall. This bill allowed casinos along the Coast to rebuild 800 feet from the Mean High Water Line. In November 2005, the Commission adopted regulations to implement the changes brought by HB 45 and began hearing applications from operators to rebuild on land.

In passing HB 45 many legislators supporting the bill made comments through entries in the House Journal that they were only supporting HB 45 to allow casinos to rebuild on-shore within a narrowly defined area. The express intent was ***not to expand gaming*** in any manner; otherwise they would not support it. In other words, if a casino site was illegal prior to Hurricane Katrina it would not be made legal by HB 45.

Recently, MGHA has been involved in litigation with RW Development, Diamondhead Real Estate and the Commission. The litigation has involved two sites: one in Biloxi located along Veterans Avenue (on the north side of Highway 90 called the "RW" site) and the other in Diamondhead (along a marsh area that is thousands of feet from the Bay of St. Louis called the "DH Site"). Both RW and DH have argued that the sites are legal based on HB 45, although there is no question that prior to Hurricane Katrina and the passage of HB 45 the sites were illegal.

In 2008, the Commission (made up of Jerry St. Pe', John Hairston and Nolen Canon) ***ruled the RW site illegal***. In 2014, the Commission (made up of Mr. Hairston, Mr. Canon and Wally Carter) reviewed and ***ruled the Diamondhead site illegal***. Neither RW nor DH appealed, ***and the decisions became final***.

In 2015, three new commissioners were named to the Commission, namely, Al Hopkins, Jerry Griffith and Tom Gresham. Mr. Hopkins was appointed Chairman of the Commission. Mr. Hopkins is a licensed attorney actively engaged in the practice of law. Mr. Griffith is a retired agent from the Internal Revenue Service, and Mr. Gresham is a successful statewide business operator. Commissioners Griffith and Gresham are not attorneys and have not had professional experience with gaming sites. However, Chairman Hopkins previously represented developers seeking to build a casino on Bernard Bayou, a site located in Gulfport at the NE intersection of 1-10 / Hwy 49. The Commission denied the site (Commissioners W.W. Gresham, Victor Smith, Robert Engram, and Executive Director Paul Harvey). The case went to the Mississippi Supreme Court, and it upheld the Commission's ruling that the site was not a legal gaming site. *Miss. Gaming Comm. v. Board of Education*, 691 So. 2d 452 (Miss. 1997).

With this background, there are several important points we wish to bring to your attention:

1. In 2016, RW filed its second application for approval of the RW site. And, the Commission, shortly thereafter, announced efforts to consider significant changes to two regulations pursuant to the Administrative Procedures Act. Both involved attempts to ***expand gaming***.

Rule 2.2 – Defines Location

NOTE: The City of Biloxi rezoned a 12 acre area as WF (for gaming) that is not in a location where gaming is permitted. The City did this over objections from local residents. After the zoning change, the MGC proposed changing Rule 2.2 so as to make the 12 acre area a legal gaming site. MGHA filed a written objection to the rule change. ***The effect of the proposed rule change would have expanded gaming to an area where gaming had been illegal for over 20 years.***

Rule 1.4 – Defines Where Gaming is Legal if Conducted on Land

NOTE: The Commission proposed a change to remove language from Rule 1.4 cited by the Commission when it denied the RW and DH sites in 2008 and 2014. MGHA filed its written objection with the Commission and cited to the language in the statute and to the express legislative intent found in the House Journal that in passing HB 45 the legislature was not expanding gaming. ***The proposed rule change was contrary to the legislative intent and would have dramatically expanded gaming sites not only to include the RW site, but to open up gaming across from "Sand Beach" areas along Hwy 90 in Harrison and Hancock County (a 26 mile span).***

There was such widespread opposition that the Commission did not take up the changes. Efforts to change Rule 1.4 did not end there.

2. In January 2017, the Commission announced “special hearings” to consider the RW and DH sites previously found illegal in 2008 and in 2014. MGHA made an open records request to learn more about the applications, but was told the applications were “confidential.” MGHA appeared with its legal counsel on February 16, 2017. RW and DH appeared with legal counsel and called witnesses to introduce “evidence for the record.” MGHA made presentations supporting the Commission, including information supporting the decisions in 2008 and 2014. During the proceeding, ***the Chair repeatedly said MGHA needed to introduce “evidence for the record.”*** MGHA did so, but MGHA also requested the opportunity to submit information after the hearings because it had just seen the applications for the first time during the hearings. The Chair indicated he would not allow any post hearing information to be added to the record, ***yet counsel for the MGC did not present any “evidence for the record.”*** If MGHA had not appeared, the only “evidence for the record” would have been introduced by RW and DH.
3. The 2008 and 2014 Commission decisions regarding the RW and DH sites were not appealed and were final. The law is clear that once the time for an appeal expires the decisions become final and cannot be reconsidered. The legal term is ***res judicata***. In spite of this principle of law, the MGC allowed both RW and Diamondhead to reapply and, in RW’s case, to reapply a third time (see more about this below).

NOTE: The Commission’s attorney assigned by the Attorney General has stated on the record that res judicata applies to denials of siting decisions by the Commission; thus, this doctrine should apply to bar any reconsideration of the RW and DH applications.

4. In March 2017, at the MGC monthly meeting the Executive Director recommended denial of the two sites, and the Commission voted 3-0 to accept the recommendation. Three months later, in June 2017, RW filed its third application (RW III). Again, the Commission allowed the application to go forward and ignored the principle of res judicata. At the next Commission meeting in July, the RW III matter came up on the agenda. ***Chairman Hopkins announced that he was not allowing the Executive Director to make a recommendation on the RW III application for site approval, stating that none was required under his view of the law.*** The Chair then made a motion to approve the site. He did not receive a second to his motion. The significance of not allowing a recommendation is that if the Chair’s motion had received a second, then the site would have been approved. However, if a recommendation by the Executive Director had been given and if he recommended denial of the site, then it would require a 3-0 vote to approve the site against the recommendation of the Executive Director. Notably, after his motion to approve, the Chair then made a motion not to approve the site stating on the record that the site violated the Commission regulations, ***but that in his legal opinion the Commission regulations were not legal.***

These statements and actions are significant for several reasons, including:

- the Commission again ignored the principle of res judicata allowing RW to file a third application when RW could have made the same arguments in RW I or RW II;

- the Chair undermined the regulations the Commission adopted in November 2005 (more than 13 years ago) that have been applied to at least eight different sites during the rebuilding period that followed Hurricane Katrina;
- the position to support the RW site is contrary to the legislative intent and directives *not to expand gaming*, which the MGC acknowledged in its 2008 and 2014 rulings;
- the position to not allow a recommendation of the Executive Director on site approval is contrary to the position of the Commission's own legal counsel;
- the position to not allow a recommendation of the Executive Director on site approval contradicts the process followed by the Commission for the previous 25 years, and it was done as an effort to try to avoid needing a 3-0 vote of the Commissioners if there was a recommendation by the Executive Director to deny; and
- the position to not allow the Executive Director to make a recommendation on a siting decision would effectively eliminate the Executive Director and staff from performing their statutory roles at the Commission, so necessary to the proper regulation of gaming.

5. In August 2017, MGHA appealed for judicial review of the decision not to allow the Executive Director to make a recommendation on site approvals. *RW and the Commission moved to dismiss MGHA's seeking judicial review of the Chair's stated position and actions*. The right of MGHA to appeal is supported by the case of *Casino Magic v. Ladner*, 666 So. 2d 452 (Miss. 1995). In that case, the Mississippi Supreme Court held, "We...recognize and reiterate that this Court has judicial review of any action by the MGC that exceeds its statutory authority, because the MGC is not beyond judicial review under all circumstances." Also, in 1995, the association filed a lawsuit against the Commission because it approved a gaming site contrary to its own regulation and the law. The Court heard the case, found the association was aggrieved, and found the site illegal. If the association had not appealed, then an illegal gaming site would have been approved. *Miss. Casino Operators Assoc. v. Miss. Gaming Commission*, 654 So. 2d 892 (Miss. 1995).

NOTE: The Commission is now working with RW and DH to prevent MGHA from obtaining judicial review of the Commission's actions. If the industry is blocked from seeking judicial review of actions it believes are contrary to the law, then who *will* be able to seek such review?

NOTE: As previously noted, the Commission's attorney assigned by the Attorney General asserted in its brief that a recommendation of the Executive Director is required. Nonetheless, the same attorney appeared in Court on August 8, 2019 arguing that MGHA should not be allowed to seek judicial review of the Chair's directive not to allow such a recommendation.

NOTE: RW and DH argue MGHA is motivated by fear of new competition. MGHA consists of 26 casino operators that are competitors. Competition is not the issue. MGHA's interest is to see that the law is followed consistently and that principles of law, such as res judicata, are not ignored and that the regulations adopted by the Commission are followed.

6. On April 30, 2019, RW, DH and MGC appeared before Circuit Court Judge Schmidt for oral arguments in RWII and DHII. Before the arguments began, *the MGC attorney and the RW/DH attorneys agreed to there being no court reporter or other record of the arguments made during this hearing. The court reporter then left the courtroom.* In this proceeding, the attorney for the Commission argued that res judicata applied. Counsel opposite argued that the Commission waived res judicata because the Commission had participated in the proceedings. MGHA (as an amicus) was not allowed to make arguments, but could only observe.
7. House Concurrent Resolution 85 (HCR 85) is a directive that the Mississippi House and Senate passed in 2018 directing four state agencies (the MGC, DMR, the SOS and PEER) to work together to create a map identifying where gaming is legal along the Mississippi Gulf Coast. This directive was given for the purpose of adding “transparency” and “efficiency” to the process. Of course, once the map is drawn, it can be submitted to the Legislature for its review. We have learned that meetings were planned to comply with HCR 85 as directed by the House and Senate, but we understand the MGC Commissioners have directed MGC Executive Director Allen Godfrey not to participate in this process. Even if the map once drawn may be merely advisory and may not be binding on the MGC, it is questionable whether the Commissioners have the authority to direct the MGC Executive Director not to comply with HCR 85, again, a joint resolution issued by the House and Senate.
8. Applications by RW and DH have been labeled “confidential” and no one has been able to review what information is being presented. This “confidential” label was used by counsel for RW to submit a 16 page ex parte letter to the MGC prior to the ruling in March 2017. The purpose of the letter was to tell the MGC why RW/DH believed a recommendation from the Executive Director is not required. This is the position adopted by the Chair in July 2017. Because it was ex parte, MGHA was not able to review the letter or refute the arguments. As stated above, the attorney for the MGC argued in its DH Appellee Brief that a recommendation of the Executive Director is required.

The gaming operators invested billions of dollars in the State of Mississippi prior to Hurricane Katrina and then again reinvested billions in Mississippi after the storm. The actions of the Commission since October 2015 have caused serious concerns about the Commission as a stable consistent regulatory body. Further, the industry is concerned as it has watched the Commission dedicate an extraordinary amount of its resources to assist RW and DH.

Several questions come to mind:

- What could possibly be the motivation for holding “special hearings” to reconsider two sites found to be illegal years prior, when the decisions were final and not appealed?
- Why would the MGC hold “special hearings” but not allow MGHA to introduce evidence after the hearing when the hearing was the first time MGHA was able to see what RW and DH presented?



- If the MGC was going to restrict MGHA as it did, then why would the MGC not have put into evidence at the February 2017 hearings its own evidence gathered in support its decisions to deny the sites in 2008 and 2014? Was MGC attempting to make a "record" with limited information opposing the applications?
- Why would the MGC oppose MGHA in seeking judicial review of MGC's actions if it believes its actions are correct?
- Why would the MGC act inconsistently with the legal positions of its own attorney, e.g., that is, res judicata applies and an Executive Director's recommendation is required?

And, if the Commission is going to by-pass the Administrative Procedures Act by undermining longstanding Commission regulations, ignore the law of res judicata, and work to prevent judicial review of its questionable legal opinions, then the industry must ask:

- Where will gaming be legal along the Gulf Coast in Mississippi? Drawing the map pursuant to HCR 85 will help answer this question and restore stability to the industry, yet the Commission apparently has directed Executive Director Allen Godfrey not to participate.

We ask for your help in seeking answers to these questions. Our attorneys will be glad to meet with you to show any documentation you may wish to review after reading this letter. We thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Larry Gregory".

Larry Gregory
Executive Director